not entitled to a monopoly in the business of supplying repair parts,[5] although in these cases the manufacturer may be said to have established a "business system" within the meaning of the court. In *Globe-Wernicke* v. *Fred Macey Co.*[6] the court declined to restrain the defendant from making sections which fitted a sectional bookcase exploited by the plaintiff. The Meccano case and its predecessor, *Prest-O-Lite* v. *Davis*,[3] thus represent a distinct innovation in the law of unfair competition.[7] This court would infuse a new morality into business activities, a more exacting ethical standard, which, we believe, cannot survive in the face of other and weightier considerations with which it necessarily comes in conflict.

Free competition is a part of the creed of every enlightened community. There is but one exception to this, namely, patent and copyright legislation, necessary concessions to the promotion of invention and literary achievement. But unless a commodity is a subject for these exceptional protective laws, the bars are down and competition is not only permissible but highly desirable. The principal case runs violently counter to these notions. It holds in store grave dangers for the consuming public, calculated as it is to create monopolies in articles not the subject of patent; and furthermore monopolies that are perpetual, a privilege not accorded by the patent laws to the greatest of inventions. Should the time arrive when it seems politic to curtail competition in other than patentable products, the very vastness of the step would seem to recommend it as a matter to be dealt with by the legislature rather than by the courts. Meanwhile the prohibition of the law of unfair competition is better confined to cases in which the "offending" trader has resorted to some sort of deception.

THE FEDERAL TRADE COMMISSION AS SPECIAL MASTER IN ANTI-TRUST SUITS. — Section seven of the Federal Trade Commission Act [1] permits a federal court which has determined upon the dissolution of a combination violating the Sherman Act [2] to refer to the Commission the drawing of the decree directing the scheme of dissolution. This

[5] Bender *v.* Enterprise Mfg. Co., 156 Fed. 641; Deering Harvester Co. *v.* Whitman & Barnes Mfg. Co., 91 Fed. 376; Magee Furnace Co. *v.* Le Barron, 127 Mass. 115; Neostyle Mfg. Co. *v.* Ellam's Duplicator Co., 21 Reports of Patent, Design and Trade-Mark Cases, 185.

[6] 119 Fed. 696.

[7] These decisions can find no support in such cases as Board of Trade *v.* Christie Grain & Stock Co., 198 U. S. 236, in which the defendant induced a breach of trust; or Sperry & Hutchinson Co. *v.* Weber & Co., 161 Fed. 219, and Butterman *v.* Louisville & Nashville R. Co., 207 U. S. 205, where the defendant was bringing about breaches of contract. In Fonotopia, Ltd. *v.* Bradley, 171 Fed. 951, the defendant was restrained from reproducing phonograph records from a record obtained from the plaintiff. This element of using another's product in the production of one's own is not to be found in Prest-O-Lite *v.* Davis, *supra*, and though perhaps present in Meccano, Ltd. *v.* Wagner, *supra*, was not the ground relied on, the decision going squarely on the basis of interference with a selling system. Moreover, Fonotopia, Ltd. *v.* Bradley seems to be nothing more than the reproduction of an unpatented and uncopyrighted article — most imitations profit by the labor and money expended in perfecting the original product. *Cf.* Keystone Type Foundry *v.* Portland Pub. Co., 186 Fed. 690.

[1] 38 STAT. AT LARGE, § 7, 722.

[2] 26 STAT. AT LARGE, 209.

section was evoked by the incompetency which the courts have exhibited in handling the problem of dissolution. What is an illegal monopoly under section one of the Sherman Act is a purely judicial question; but how to make it legal under section four is an administrative question, requiring for a judge an unconscionable devotion of time and an impossible application of special knowledge.[3] Conscious of their ineptitude, the judges have not attempted to draw the decrees themselves. Instead they have extended the analogy in ordinary equity practice of letting the successful counsel draw the decree on approval[4] to letting the defendant combination dissolve itself on approval.[5] However effective a comparatively simple decree drawn by the successful counsel may be, it is another thing to ask an illegal combination to cut its own throat. For it has every interest to miss the jugular, particularly when the attendant court is manifestly ignorant of where the jugular of a vast industrial organism is.[6] Nevertheless, almost two years have passed and already two judges[7] have expressly refused to make use of the provision before Judge Learned Hand of the District Court for the Southern District of New York for the first time accepts the opportunity. In *United States* v. *Corn Products Refining Co.*[8] Judge Hand decreed that the defendant should file a plan for dissolution with the Federal Trade Commission and requested that body to present a final plan for confirmation by the court. A most happy consummation, for the Commission alone, composed of business men "equal to the task of keeping pace with the perverse ingenuity of private concerns"[9] and armed with the power of requiring testimony and documents,[10] combines in itself the eagerness for success that inspires the court and the Department of Justice and the expert knowledge possessed by the defendant itself. Furthermore, the Commission is able under section six to investigate

[3] "How to secure a satisfactory dissolution of a trust is an immensely difficult economic problem, rather than a legal problem." E. D. DURAND, THE TRUST PROBLEM, 110. "It is an economic question, not a legal question, and neither the court nor the Department of Justice is equipped to solve it." Alex. G. Barret, "The Federal Trade Commission," 81 CENT. L. J. 166, 170. Referring to the Australian Industries Prevention Act of 1906, "I arrive at the general conclusion that . . . what is more imperatively needed is an independent commission for the administrative supervision and judicial enforcement of the general purposes of the Acts." W. JETHRO BROWN, THE PREVENTION AND CONTROL OF MONOPOLIES, 90. And see HARLAN AND MCCANDLESS, THE FEDERAL TRADE COMMISSION, § 37.

[4] See Stepp *v.* National Life, etc. Ass'n, 37 S. C. 417, 431, 16 S. E. 134, 139, where the objection that the plaintiff's counsel was allowed to draw the decree was held properly overruled. See also Horn *v.* Horn, 234 Ill. 268, 274, 84 N. E. 904, 906; and 1 WHITEHOUSE, EQUITY PRACTICE, § 412, p. 654. Also the equity rules in Massachusetts, Maine, Pennsylvania, Rhode Island, and Vermont. Of course, this does not prevent the court from doing it itself. Rider *v.* York Haven Water, etc. Co., 242 Pa. St. 141, 145, 88 Atl. 903, 904.

[5] See United States *v.* International Harvester Co., 214 Fed. 987, 1001.

[6] Witness the signal unsuccess of the dissolution of the Standard Oil Co., attempted in United States *v.* Standard Oil Co., 173 Fed. 177, 197.

[7] Judge Hazel, in United States *v.* Eastman Kodak Co., 226 Fed. 62, 80, and 230 Fed. 522, 524. And Judge McPherson, in United States *v.* Reading Co., 226 Fed. 229, 285, who said: "We are unable to see any advantage in turning this matter over to the Commission instead of dealing directly with it ourselves."

[8] 234 Fed. 964, 1018.

[9] W. JETHRO BROWN, THE PREVENTION AND CONTROL OF MONOPOLIES, 91.

[10] Federal Trade Commission Act, § 9, 38 STAT. AT LARGE, 722.

and report to the Attorney General the manner in which its decree is being carried out; and either this report may be made public or application may be made to the court through the Attorney General for a supplementary decree.[11]

What is the place of this provision in our legal system? It is not an exotic; it is not drawn from foreign analogies. Rather, as the section itself announces, it is a development of the ancient office of master in chancery. Moreover it would seem that the step from the ordinary master to an expert commission was not too broad for judicial legs, even without legislation. Perhaps at first the chancellor employed a master merely to save his own time for other suitors; no special experience or knowledge which the chancellor did not possess was necessary to ascertain heirs, next of kin, or creditors, to inquire into a title, to settle an accounting, or to conduct a judicial sale. But a reference is not improper merely because the subject may be beyond the court's competence.[12] At the least, what may be asked of counsel may be asked of a master. In fact, there is no limit to the subjects which may be referred to a master.[13] The only restriction is that the court may not surrender its prerogative of final decision. Therefore the complaint of Judge Learned Hand in *Parke-Davis & Co.* v. *Mulford Co.*,[14] that he had to determine by himself a complicated question of chemistry in a patent suit, seems to be founded only on his own hesitation.

Nevertheless, although the difference between the dissolution of a partnership and the dissolution of a monopoly be one of degree only, the difficulties of the latter are so portentous that more was necessary adequately to meet them than a mere extension of equity practice. For, unlike a simple decree enjoining a single act or forbearance, these decrees of dissolution no more enforce themselves than does the Sherman Law itself. Section seven must be read with section six and the rest of the Act. A modern American monopoly is too much for a master to cope with; a commission with permanent sittings becomes necessary. And only an Act of Congress could create such a commission.

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[11] See Mootry *v.* Grayson, 104 Fed. 613, 615; and Fulton Inv. Co. *v.* Dorsey, 220 Fed. 298, 299. Also 1 WHITEHOUSE, EQUITY PRACTICE, § 417. Furthermore, the court often expressly retains jurisdiction to make such further decrees as may become necessary. See United States *v.* American Tobacco Co., 191 Fed. 371, 431.

[12] Thus, for example, in Barr *v.* Lamaster, 48 Neb. 114, 119, 66 N. W. 1110, 1112, an architect was appointed to be special commissioner to erect a partition wall through a building. See also Chicago, Milwaukee, etc. Ry. Co. *v.* Tompkins, 176 U. S. 167, 180, where the Supreme Court advised that adjustments of railroad rates should be sent to a master.

[13] "And it has been truly said that there was no question at law or in equity which a master may not have to decide, or respecting which he may not be called upon to report his opinion to the court." BENNET, THE MASTER'S OFFICE, 4. The only restriction put upon reference to a master by the Federal Equity Rules, 59, 226 U. S. 649, 666, is that "some exceptional condition requires it."

[14] 189 Fed. 95, 115. "I cannot stop without calling attention to the extraordinary condition of the law which makes it possible for a man without even the rudiments of chemistry to pass upon such questions as these. . . . How long we shall continue to blunder along without the aid of unpartisan and authoritative scientific assistance in the administration of justice no one knows." But expense, it is submitted, was the only obstacle to his stretching out his hand for such assistance in the shape of a special master.